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71-1497

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

LORETTA FAY BECK, *Petitioner,*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BILL ATKINS
P. O. Box 248
407 Arlington Bank & Trust Building
Arlington, Texas 76010
Attorney for Petitioner

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone 332-4070

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

LORETTA FAY BECK, *Petitioner,*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit are not yet reported. The corrected original opinion dated October 21, 1971, is set out in Appendix A attached hereto on pages 16-18. The opinion denying rehearing, dated February 18, 1972, is set out on pages 19-20 of Appendix A.

Petitioner recovered judgment after a jury trial in the United States District Court for the Northern District of Texas at Fort Worth. (Appendix B, pp. 21-22,

attached hereto) No opinion exists with respect to that judgment. On March 8, 1972, pursuant to the mandate of the Court of Appeals, the District Court withdrew its original judgment for Petitioner and entered a "take nothing" judgment. (Appendix C, pp. 22-23 attached hereto)

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 21, 1971. A timely filed Petition for Rehearing and Rehearing En Banc was denied on February 18, 1972. This petition for certiorari was filed within ninety days of that date. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The decision of the Court of Appeals is in conflict with three Texas decisions cited in the footnote to the Opinion. (Appendix A, p. 17) In its Opinion on Rehearing, the Fifth Circuit states that its decision is in conflict with at least two recent Texas cases. The questions presented here are:

1. Whether the Court of Appeals should have followed the Texas decisions which apply the doctrines of waiver and estoppel?

2. Does the decision of the Court of Appeals establish a double standard in Texas between the state courts and the federal courts so as to grant insurance companies immunity from the doctrines of waiver and estoppel only in the federal courts?

3. Is there any justification for the Fifth Circuit's "Erie guess" that the Supreme Court of Texas would today reject the historic and universally accepted doctrines of waiver and estoppel?

STATEMENT

Suit was instituted by Petitioner Loretta Fay Beck in the United States District Court for the Northern District of Texas to recover the proceeds of a life insurance policy. Jurisdiction rested on diversity of citizenship. It is the duty of the federal courts to apply the Texas law as declared by the Texas Supreme Court and the intermediate Courts of Civil Appeals.[1]

The evidence established:

1. The insured, Jerry D. Beck, was not in good health at the time the policy was delivered.

2. Connecticut General had *knowledge* of Beck's illness prior to the time the policy was delivered and prior to the time it collected the full premiums.

3. Connecticut General, with notice of the grounds for voiding the policy, failed to rescind the policy and return the premiums during Beck's lifetime. See Appendix D (pp. 24-28) for a summary of the facts with references to the record.

After a jury trial, both parties made motions for judgment. Briefs were submitted to the District Court on whether Connecticut General had waived or was estopped to insist on a "good health" clause requiring

[1]Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487; Stoner v. N. Y. Life Ins. Co., 311 U.S. 464, 85 L. Ed. 284, 61 S. Ct. 336.

Beck to be in good health at the time the policy was delivered. All facts necessary to invoke the doctrines of waiver and estoppel were found by the jury and the District Court.[2] District Judge Leo Brewster, a distinguished member of the Texas Bar, held that under Texas law, Connecticut General had waived and was estopped to assert the provisions of the "good health" clause to void the policy. Judgment was entered for Petitioner for the proceeds of the policy, 12% penalty, attorney's fees, interest and costs.[3]

Petitioner contends that the doctrines of waiver and estoppel have been *consistently* applied against insurance companies in Texas for a century. In 1885 the Supreme Court of Texas explained the rationale for the doctrines:

> "To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to *attempt a fraud.*" Liverpool & London & Globe Ins. Co. v. Ende, 65 Tex. 118, 123 (Tex. 1885)

This language was quoted in *Lee v. Mutual Protective Ass'n. of Texas*, 47 S.W. 2d 402, Syl. 3, p. 404 (Tex. Civ. App. 1932 writ dism'd) and *Superior Ins. Co. v. Kling*, 321 S.W. 2d 151, pp. 155-156 (Tex. Civ. App. 1959, Aff'd. 327 S.W. 2d 422)

The Court of Appeals for the Fifth Circuit rejected

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[2]The material facts which invoked the doctrines of waiver and estoppel are summarized in paragraphs 4-8 in Appendix D attached hereto on pages 25-28.

[3]Appendix B, p. 21, Judgment of the District Court dated November 9, 1970.

Judge Brewster's view of the Texas law, ignored the rationale of the historic Texas decisions and sanctioned the fraud of Connecticut General. The $116,-034.22 judgment entered in favor of Petitioner was reversed on the sole ground that the Fifth Circuit is entitled to make an *"Erie guess"* that the Texas Supreme Court would today reject its prior decisions and hold that Connecticut General *cannot* waive or be estopped to assert the "good health" clause. The Fifth Circuit permitted Connecticut General to keep $833.05 in premiums and to avoid all liability — a new and shocking precedent. (Appendix C, pp. 22-23, Judgment Pursuant to Mandate)

REASONS FOR GRANTING WRIT

1. The Decision of the Court of Appeals for the Fifth Circuit is in Conflict With the Established Law of Texas.

The Fifth Circuit did not concern itself with the facts of this case—it held that the doctrines of waiver and estoppel no longer have application in Texas regardless of the facts. It admits that its decision is in conflict with five Texas decisions—three cited in the margin of its original Opinion and two cited in the Opinion on Rehearing.

2. The Opinion of October 21, 1971, Is Patently Absurd.

The Fifth Circuit tossed aside all Texas authorities on waiver and estoppel with the bizarre statement:

> "This is not the law in Texas as the following cases make clear."

It then cites three cases which do not support its conclusion. In fact, the doctrines of waiver and estoppel were zealously guarded in each of the three cases:

First Case: Washington Nat. Ins. Co. v. Craddock, 109 S.W. 2d 165 (Tex. 1937) deals with an accidental gunshot wound suffered by the insured *subsequent* to the delivery of the policy—not with an existing illness known to the insurer at the time the policy was delivered. The Supreme Court looked for facts which would invoke the doctrines and observed that: (p. 166)

> "* * * no consideration moved to it (the insurer) *after* the accident for the assumption of such liability. The insured seeks to create that liability by invoking the doctrine of waiver. That doctrine cannot be made to serve that purpose."

The Supreme Court was careful to point out those instances where the doctrine applies: (p. 166, bottom. first col.)

> "The cases where the doctrine of waiver, or estoppel, has been applied have largely been cases where the insurance companies have relied on a forfeiture of the contract, upon breaches of the warranties and conditions to work such forfeitures; and in many such cases this court and other courts of last resort have held that if the companies have led the other party, to his prejudice, to his expense, to understand that such forfeitures, such breaches of warranties and conditions, would not be insisted upon, then the companies would be estopped from asserting such defenses."

Second Case: Scott v. Industrial Life Ins. Co., 411 S.W. 2d 769 (Tex. Civ. App. 1967, no writ hist.) affirms the rules on waiver and estoppel; however, recovery is denied because the insured was not dead. Even in that absurd situation the Court of Appeals searched the record for facts which would invoke the rules on waiver and estoppel and stated: (Syl. 3, p. 773)

> "Our review of this record reveals no evidence to demonstrate the application of the rule sought to be applied by appellant."

Third Case: Powell v. American Casualty & Life Co., 250 S.W. 2d 744 (Tex. Civ. App. 1952, writ ref'd. n.r.e.), is not in point because the policy had lapsed for non-payment of premiums. The question of whether the insurer knew of Powell's illness at the time the policy was issued is not in the case. The Dallas Court of Civil Appeals again recognized the doctrine of estoppel and explained why it had no application: (p. 746)

> "One of the essential elements of estoppel is that the party asserting it must have been misled or caused to change his position to his injury."

Analyzing the three cases relied on by the Fifth Circuit, it is obvious that:

(1) the facts necessary to invoke the doctrines of waiver and estoppel were missing in each case;

(2) Texas courts have zealously guarded the doctrines of waiver and estoppel;

(3) there is no dicta or other indication in any of the cases that the doctrines will ever be questioned or abandoned.

While the Fifth Circuit failed to notice the language in its authorities which supported the doctrines, it did recognize that at least three Texas cases were in conflict with its decision. The Fifth Circuit dismissed the conflict as follows:

> "To the extent that the cases cited in the margin would support appellee's position they have been overruled by the above cited cases."

That statement is utter nonsense! The three "*overruled*" cases continue to be cited as controlling by the Texas courts.[4] There is no conflict between any of the authorities cited.

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[4]*First "Overruled" Case: National Aid Life Ass'n. v. Murphy*, 78 S.W. 2d 223 (Tex. Civ. App. 1934, writ dism'd) has been cited in *fifteen* Texas decisions as of March, 1972. In 1957 the Texas Supreme Court cited the Murphy case in *Texas Prudential Ins. Co. v. Dillard*, 307 S.W. 2d 242, 252 (Tex. 1957) and gave no indication that rule had ever been questioned or would ever be questioned. The Fifth Circuit obviously misread the Scott case when it cited it as an authority overruling the Murphy case.

Second "Overruled" Case: Terry v. Texas Prudential Ins. Co., 77 S.W. 2d 761 (Tex. Civ. App. 1934, writ dism'd) has been cited over *twenty* times. In 1944 the Texas Supreme Court quoted from the Terry case in *Hassell v. Commonwealth Casualty & Ins. Co.*, 184 S.W. 2d 917, 919 (Tex. 1945).

Third "Overruled" Case: Southern Underwriters v. Jones, 13 S.W. 2d 435 (Tex. Civ. App. 1929, writ ref'd) is one of *fifty* authorities cited in 1962 in *Mims v. Houston Fire & Casualty Co.*, 362 S.W. 2d 880 (Tex. Civ. App. 1962, no hist) for the proposition that the doctrines will be applied when (p. 882) "The facts necessary to show a waiver and estoppel are not in dispute". The Mims case contains one of the largest lists of Texas authorities in point.

3. The Opinion on Rehearing—The "Erie Guess" Is Not Justified By Any Dicta, Doubt, or Ambiguities.

On rehearing the Fifth Circuit recognized that it's decision was in conflict with the 1957 Dillard decision and the 1963 Erwin decision; however, it concluded:

> "Although the former two cases clearly raise a doubt as to what the Supreme Court of Texas would hold the applicable rule of law to be today, we continue to believe our initial *Erie* guess to be the correct prediction and therefore adhere to our original decision."

As authority for its "*Erie* guess", the Fifth Circuit cited *Bennett v. National Life & Accident Ins. Co.*, 438 S.W. 2d 438, (Tex. Civ. App. — 1969, writ dism'd). The Bennett case is not in point nor is it in conflict with any decision of the Texas Supreme Court. The Bennett opinion clearly points out that the company was not charged with knowledge of the insured's bad health *at the time the policy was delivered.* The Bennett decision rests on the decision in *Great Nat'l. Life Ins. Co. v. Hulme,* 136 S.W. 2d 602 (Tex. 1940) in which the Supreme Court was careful to point out the lack of "knowledge" on the part of the insurer at the time its policy was delivered: (p. 603, 604)

> "* * * Sometime *after the policy was delivered,* but before Mrs. Hulme died, the company learned for the *first time,* that Mrs. Hulme was afflicted with heart trouble when she made application for insurance and at the time the policy was delivered. Upon learning this, the company *promptly* repudiated all liability under the policy, tendered back the premiums which had been paid, and did

not accept any premium after that." (Emphasis added.)

In this instance, Connecticut General had actual knowledge that Beck was ill prior to the time the policy was delivered. It is charged with the knowledge of its agent,[5] its manager, as well as the information contained in its home office file indicating that Beck was ill when the policy was delivered. It did nothing to repudiate the policy while Beck was alive. See Appendix D, paragraphs 4-7, pp. 25-27, for references to the record.

There is no dicta, doubts or ambiguities in any Texas decision which can serve as the basis of the Fifth Circuit's "Erie guess".

4. No Guessing Required: Texas Courts Have Consistently Applied At Least Two Rules on Waiver and Estoppel.

RULE ONE: *Delivery of the policy with knowledge of the insured's illness waives a good health clause.*

The most recent Texas case recognizing the *consistency* of the application of this rule is *Republic Ins.*

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[5]The circumstances under which the agent's knowledge is imputed to the insurer were discussed by the Fifth Circuit in *Southern Farm Bureau Casualty Ins. Co. v. Allen*, 388 F.2d 126 (5th CCA 1967) pp. 129-130 (Syl. 3-5): Also see: *Adams v. LaSalle Life Ins. Co.*, 99 S.W. 2d 386 (Tex. Civ. App. – 1936, writ dism'd) p. 388 (Syl. 1-7); *Hassell v. Commonwealth Cas. & Ins. Co.*, 184 S.W. 2d 917, 919 (Tex. 1945); *Germania Mutual Aid Ass'n. v. Trotti*, 318 S.W. 2d 918 (Tex. Civ. App. – 1958, no hist.); *Old Colony Ins. Co. v. Messer*, 328 S.W. 2d 335, 337 (Tex. Civ. App. – 1959, writ ref'd. n.r.e.); *National Life Ass. Co. of Texas v. Neves*, 370 S.W. 2d 144 (Tex. Civ. App. – 1963, writ ref'd. n.r.e.); *Farmers Mutual Protective Ass'n. v. Pack*, 465 S.W. 2d 228 (Tex. Civ. App. 1971, writ ref'd. n.r.e.).

Co. v. Silverton Elevators, Inc., 477 S.W. 2d 336, (Tex. Civ. App., Feb. 14, 1972, Rehearing denied March 13, 1972, Application for writ of error pending) Justice Reynold states: (Syl. 1, pp. 337-338)

> "The rule (on waiver and estoppel) has been followed *consistently* in Texas. * * * The rationale for the rule is that an insurance company may not deliver a policy with full knowledge of facts upon which liability thereunder may be disputed and then insist upon these facts in avoidance of the liability undertaken. Such course of action is an assertion that the policy is valid at time of delivery and is a waiver of the known ground of invalidity by which the insurer is estopped from defeating an action brought on the policy by that defense."

In February, 1972, the Erwin case which the Fifth Circuit noted, but refused to follow, was cited in *Minnesota Mutual Life Ins. Co. v. Morse*, 476 S.W. 2d 753, 758 (Tex. Civ. App. — Feb. 1972, Application for writ of error pending) as an authority for waiver and estoppel.

In *Lee v. Mutual Protective Ass'n. of Texas*, 47 S.W. 2d 402 (Tex. Civ. App. — 1932, writ dism'd. Syl. 3) the Court used italics to stress that a good health clause is a "*condition precedent which may be waived*". Knowledge that the insured was "*in bed part of the time*" was sufficient to give the insurance company notice of her ill health.

The rule, rephrased in terms of this case, is:

> When Connecticut General delivered its policy to Beck, accepted and retained premiums thereon

> with knowledge of his illness, it may not insist on the provisions of a good health clause which would invalidate the policy from its inception. Delivery of the policy with such knowledge constitutes a waiver of any good health clause or of any policy conditions inconsistent with the known facts. Connecticut General is estopped thereafter from asserting the breach of such conditions.

Other Texas cases announcing this rule are: *Terry v. Texas Prudential Ins. Co.,** 77 S.W. 2d 761 (Tex. Civ. App. — 1934, writ dism'd) Syl. 2, p. 764; *Texas Prudential Ins. Co. v. Dillard***, 307 S.W. 2d 242 (Tex. 1957); *Legal Security Life Ins. Co. v. Erwin,*** 372 S.W. 2d 750, (Tex. Civ. App. — 1963, writ ref'd. n.r.e.); *Perry v. Citizens Life Ins. Co.*, 163 S.W. 2d 743 (Tex. Civ. App. — 1942, no hist.) Syl. 3, 4, p. 747; and *Southern Underwriters v. Jones,** 13 S.W. 2d 435, Syl. 1 (Tex. Civ. App. — 1929, writ ref'd). Also see: *Baker v. Fort Worth Mutual Benev. Ass'n.*, 280 S.W. 165, 169 (Tex. 1926); *Wirtz v. Sovereign Camp W.O.W.*, 268 S.W. 438, Syl. 12, 13, p. 441; (Tex. 1925); *Germania Mutual Aid Ass'n. v. Trotti*, 318 S.W. 2d 918 (Tex. Civ. App. 1958 — no writ hist); *Old Colony Ins. Co. v. Messer*, 328 S.W. 2d 335, 337 (Tex. Civ. App. — 1959, writ ref'd. n.r.e.); *Mims v. Houston Fire & Casualty Ins. Co.*, 362 S.W. 2d 880 (Tex. Civ. App. — 1962, no writ hist.) and the fifty authorities cited therein; *Farmers Mutual Protective Ass'n. v. Pack*, 465 S.W. 2d 228 (Tex. Civ.

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*Cited in the margin of the Fifth Circuit's Opinion as being overruled.

**Cited by the Fifth Circuit on rehearing as being in conflict wth its decision.

App. — 1971, writ ref'd. n.r.e.); 32 Tex. Jur. 2d 408, 416, Secs. 243-246.

The respect which Texas courts have for this rule is apparent by the number of times each of the above authorities have been cited. (See Shepard's Texas Citations.)

RULE TWO: *Waiver by Election of Defense.*

The second rule on waiver was recently stated in *Lancon v. Employers Nat. Life Ins. Co.*, 424 S.W. 2d 321 (Tex. Civ. App. — 1968, writ ref'd. n.r.e.) On page 322 the Court states: (Syl. 1)

> "Where the company denies liability or refuses to pay a loss on a specified ground, it is estopped to assert other grounds relieving it from liability of which it had full knowledge where insured has acted on its position as announced and suffered resultant detriment, or, as the rule is sometimes more broadly stated, *when one specific ground of forfeiture is urged against a policy of insurance and the validity thereof denied on that ground alone, all other grounds are waived.*" (Emphasis added)

This is the same rule announced in *Nat'l. Aid Life Ass'n. v. Murphy,** 78 S.W. 2d 223, 227 (Tex. Civ. App. — 1934, writ dism'd). *Woodmen of the World Life Ins. Soc. v. Armstrong*, 170 S.W. 2d 526, 529 (Syl. 3) (Tex. Civ. App. — 1943, writ ref'd) and *Great American Indemnity Co. v. McMenamin*, 134 S.W. 2d 734, 737 (Syl. 4) (Tex. Civ. App. — 1939, writ dism'd. Judgment correct).

There is no evidence that the Supreme Court of Texas would reject the wholesome, respected, and historic rules designed to protect the public against the fraud of an insurance company.

5. The Importance of the Question.

If the Fifth Circuit's decision is allowed to stand, how long will it be before a beneficiary will be afforded the protection of the doctrine of waiver and estoppel in the federal courts?

Mr. Justice Holmes once observed:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[6]

It would indeed be a "misfortune" if the Fifth Circuit's decision became the law of the federal courts in Texas.

Since the security of almost every family depends to some extent on life insurance, the decision assumes an importance far beyond the particular facts and parties here involved.

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[6] *Hyde v. United States*, 225 U.S. 347, 391.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BILL ATKINS
407 Arlington Bank &
Trust Building
P. O. Box 248
Arlington, Texas 76010
Attorneys for Petitioner

APPENDIX A.

CORRECTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1330

LORETTA FAY BECK,
Plaintiff-Appellee,

versus

CONNECTICUT GENERAL LIFE
INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

(October 21, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: Defendant-appellant, Connecticut General Life Insurance Co. (Connecticut General), issued a life insurance policy to Jerry D. Beck, who the jury found was not in good health at the time of the delivery of the policy. Connecticut General denied liability on the policy subsequent to the death of Beck, but Mrs. Beck, the beneficiary, sued and recovered on the policy in the court below. We reverse with directions that judgment be entered for Connecticut General.

The usual "good health" clause in a life insurance policy provides that the policy is null and void if the insured is not in good health at the time the policy is delivered to him. Connecticut General urges that its "good health" clause precludes liability in this case since good health is a condition precedent to the validity of the policy under applicable Texas law. We agree. *Great National Life Insurance Co. v. Hulme*, 136 S.W. 2d 602 (Tex. 1940); *American National Insurance Co. v. Lawson*, 127 S.W.2d 294 (Tex. 1939). Appellee Beck contends, however, that this condition precedent can be waived or that the company can be estopped to assert it. This is not the law of Texas, as the following cases make clear. *Washington Nat. Ins. Co. v. Craddock*, 109 S.W.2d 165 (Tex. 1937); *Scott v. Industrial Life Ins. Co.*, 411 S.W.2d 769 (Tex.Civ.App. — Dallas 1961, no writ); *Powell v. American Casualty & Life Co.*, 250 S.W.2d 744 (Tex.Civ.App. — Dallas 1952, writ ref'd. n.r.e). To the extent that the cases cited in the margin would support appellee's position,[1] they have been overruled by the above cited cases.

Mrs. Beck argues in the alternative that the provisions in this particular policy are not such as would constitute the typical good health clause covered by Texas law. The clause she recites reads as follows: "The policy shall not take effect until the policy has been delivered and the first premium paid as above provided during the lifetime of the Insured and prior to any change in his health as shown in the applica-

[1]National Aid Life Ass'n v. Murphy, 78 S.W.2d 223 (Tex.Civ. App.-Dallas 1934, writ dism'd); Terry v. Texas Prudential Ins. Co., 77 S.W. 2d 761 (Tex.Civ.App.-El Paso 1934, writ dism'd); Southern Underwriters v. Jones, 13 S.W.2d 435 (Tex. Civ.App.-Waco 1929, writ ref'd).

tion." Mrs. Beck fails to note, however, the further provision in the application which became a part of the policy: ". . . no insurance shall take effect unless and until the policy has been manually delivered to and received and accepted by me (us) and the first premium paid during lifetime and good health of the proposed insured . . ." These clauses are in no way conflicting or repugnant. Read together as they must be, they have the same effect of the good health provisions dealt with by the Texas authorities set out above.

Beck finally contends that Connecticut General has raised its good health defense too late, i.e., the defense was not raised until after the trial. This contention is without merit. The defense was raised in the pleadings and was submitted to the jury without objection.

In view of this disposition of the case, it is unnecessary to consider the other points raised by Connecticut General. Therefore, the judgment of the district court is

REVERSED WITH DIRECTIONS.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1330

LORETTA FAY BECK,
Plaintiff-Appellee,

versus

CONNECTICUT GENERAL LIFE
INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion October 21, 1971, 5 Cir., 1971, — F.2d —).

(February 18, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: In her petition for rehearing Mrs. Beck brought to our attention several Texas decisions not originally cited. Most are distinguishable, but two are not. In *Texas Prudential Ins. Co. v. Dillard*, 307 S.W.2d 242 (Tex. 1957), the Texas Supreme Court, speaking in dicta, quoted with apparent approval an earlier Court of Civil Appeals case which held that waiver and estoppel could be applied against an insurance company that delivered a policy to an insured

with knowledge that he was in bad health. In *Legal Security Life Ins. Co. v. Erwin*, 372 S.W.2d 750 (Tex. Civ.App. — Texarkana 1963, writ ref'd n.r.e), the Court of Civil Appeals applied waiver and estoppel to prevent an insurance company from asserting a good health clause when it knew at the time the policy was delivered the insured was afflicted with arthritis. On the other hand, *Bennett v. National Life and Accident Ins. Co.*, 438 S.W.2d 438 (Tex.Civ.App.—Dallas 1969, writ dism'd) has been pointed to by Connecticut General as being consonant with our holding.

Although the former two cases clearly raise a doubt as to what the Supreme Court of Texas would hold the applicable rule of law to be today, we continue to believe our initial *Erie* guess to be the correct prediction and therefore adhere to our original decision.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA 4-1313

LORETTA FAY BECK
versus
CONNECTICUT GENERAL LIFE
INSURANCE COMPANY

Judgment

The issues in this case have been duly litigated in an evidentiary trial before the Court and a jury, after proper notice to both parties, with the plaintiff and her attorneys and the attorneys for the defendant present and participating. The jury's verdict in the form of answers to special interrogatories has been received and filed. Based upon such verdict and the facts established by the evidence beyond question, the Court is of the opinion that the plaintiff is entitled to judgment against the defendant for $78,240.00, representing the face amount of the policy sued upon, $9,308.80, representing the 12 per cent Texas statutory penalty, $8,485.52, representing interest due on the face amount of the policy from December 31, 1968, to November 9, 1970, and $20,000.00, representing a reasonable attorneys fee, all of which totals $116,034.-32.

It is therefore decreed that the plaintiff, Loretta

Fay Beck, recover from the defendant, Connecticut General Life Insurance ompany, the sum of $116,-034.32, together with interest thereon at the rate of 6 per cent per annum from this date.

It is further ordered that the costs of this suit be taxed against the defendant.

Signed, November 9, 1970.

/s/ Leo Brewster
JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA 4-1313

LORETTA FAY BECK
versus
CONNECTICUT GENERAL LIFE
INSURANCE COMPANY

JUDGMENT PURSUANT TO MANDATE

The issues in this case have been duly litigated in an evidentiary trial before the Court and a jury, after proper notice to both parties, with the plaintiff and her attorneys and the attorneys for the defendant present and participating. The jury's verdict in the form of answers to special interrogatories was received and filed. Based upon such verdict and the facts established by the evidence beyond question, the Court was of the

opinion that the plaintiff was entitled to judgment and judgment was so entered. Thereafter, upon appeal the United States Court of Appeals for the Fifth Circuit reversed the case with directions that judgment be entered for the defendant, Connecticut General Life Insurance Company. The plaintiff's petition for rehearing having been denied by the Court of Appeals on February 18, 1972 and mandate having issued to this Court on February 28, 1972, it is therefore

ORDERED and DECREED that the judgment heretofore signed herein on November 9, 1970 be and it hereby is withdrawn and superseded; that the plaintiff take nothing by her suit; that judgment is hereby rendered for the defendant; and that costs of this suit be taxed against the plaintiff.

SIGNED March 8th, 1972.

/s/ Leo Brewster
JUDGE

APPENDIX D

SUMMARY OF THE FACTS[7]

The sequence of events leading to this dispute are:

(1) SALE OF THE ESTATE PLAN: Connecticut General's agent, Joseph R. Snelus, as a "Business & Estate Analyst", contacted Jerry D. Beck and after obtaining the necessary information, prepared "Estate Plan No. 26512". (R. 59, 419, 422-424) The plan consisted of a sales pitch for two insurance policies — the life insurance policy in question and a monthly income disability policy.

On July 22, 1968, Snelus took Beck's application for both policies, collected initial premiums and issued the company's "Conditional Receipt" for the initial premiums. (R. 5, Exhibit A)

(2) THE MEDICAL EXAMINATION: On September 5, 1968, Beck was examined by Connecticut General's medical examiner, Dr. Paul Rattan. (R. 98-99) Except for being overweight, Beck appeared to be in good health. (R. 113) Dr. Rattan completed part II of the application for insurance (medical history) (R. 23, 119) At the trial, Connecticut General sought to void the policy on the grounds that Beck knowingly made false statements in giving his medical history. (R. 42-44, First Affirmative Defense) The jury found against Connecticut General on these issues. (R. 521-525, Questions 1-5)

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[7] "R" references are to the printed Appendix used in the Court of Appeals. Exhibits were omitted from the appendix, but may be found in the two volume transcript of proceedings referenced as "Tr.", which was prepared by the Court Reporter and filed in the Court of Appeals.

(3) BECK'S ILLNESS: On the night of September 16, 1968, Beck "woke up with a sick stomach" (R. 65) which was thought to be a virus or gastroenteritis. (R. 163, 164) The family doctor put Beck in a local hospital for examination and found that he did not have blood pressure in his left arm. Beck recovered from his "sick stomach" and tests were made at Stephens Park Hospital in Dallas to diagnose the circulatory problem.

ELEMENTS OF WAIVER AND ESTOPPEL

(4) CONNECTICUT GENERAL HAD NOTICE OF BECK'S ILLNESS PRIOR TO DELIVERING THE POLICIES AND COLLECTING THE FULL PREMIUMS: Sometime before September 25, 1968, Beck telephoned Snelus and told the agent of his illness, that he was in or had just gotten out of the hospital, that he had a problem with poor circulation and was taking drugs to dilate his blood vessels and improve circulation. (R. 432-433, 456) The agent was also informed that Beck was scheduled to go to Baylor University Medical Center later in October for additional studies and tests. (R. 435) Snelus recalled having a discussion prior to September 25, 1968, with Mr. D. W. (Doug) Kaats, Connecticut General's Branch Manager, in which Beck's illness was mentioned as well as the fact that Beck was taking drugs to improve his circulation. (R. 433, 456) Kaats telephoned and wrote the home office a number of times after September 17, 1968, about Beck's coverage and illness. (R. 459-460) The policies were released to the agent for delivery to Beck around October 1, 1968.

(5) POLICIES DELIVERED AND PREMIUMS COLLECTED IN OCTOBER AFTER CONNECTICUT GENERAL ACQUIRED KNOWLEDGE OF BECK'S ILLNESS: Connecticut General delivered the policies to Beck in October, 1968. (R. 434) It collected an additional $718.25 in premiums on October 7, 1968. (Plaintiff's Exhibits 3, 4 and 5, Tr. 14-16) $542 of this amount was for the balance of the first year's premium on the life insurance policy in question.

(6) REFUSAL TO RESCIND: After delivery of the policies, Snelus and his manager, Kaats, anticipated that Beck would make claim under the monthly income disability policy. Kaats again telephoned the home office on October 22, 1968, and stressed the fact that Beck was ill, that he had been off work since September 20 and was going back into the hospital for further tests. Instead of immediately rescinding the policy under the good health clause, refunding the premiums and asking the agent to pick up the policies, the home office wrote Kaats: (Tr. 349, Plaintiff's Exhibit 16)

> "On October 22 you called regarding the above-named for whom we issued an MI contract in September. You indicated to me that *Mr. Beck had became ill around September 20 and although he had not worked since that date,* there was some question regarding disability because your agent had learned that he had been spending some time fishing. The point of your call was that *Beck was going back to the hospital* and there, obviously, would be a question regarding any potential claim during the period of time immediately subsequent to issue."

Connecticut General is burdened with the knowledge of its agent Snelus, the knowledge of its manager Kaats, (all acquired prior to delivery of the policies) as well as the actual knowledge of Beck's illness as shown in its home office files. In addition, the jury found that Connecticut General, with notice of the facts, could have rescinded the policy during Beck's lifetime. (R. 527, Question No. 8)

(7) BECK'S DEATH: Beck was admitted to the Baylor University Medical Center on October 29, 1968. He underwent extensive tests and studies and was discharged on November 6, 1968. He was told that he had a "heart like a 16 year old". (R. 321, 458) Beck returned to work and on November 16, 1968, at age 34, died unexpectedly. No autopsy was performed.

(8) ELECTION OF DEFENSES: Petitioner filed a claim for the life insurance proceeds in December, 1968. Seven months later, in June, 1969, Connecticut General denied the claim on the grounds that Beck had fraudulently misrepresented his medical history to Dr. Rattan. (Tr. 417, Plaintiff's Exhibits 30 and 31) The so-called "good health" clause found in the application (R. 22) or the policy provision concerning a "change of health" were not mentioned. (R. 8, second paragraph) When suit was filed, Connecticut General answered and elected to raise the single defense based on Beck's representations concerning his medical history. It has never plead that there was a condition precedent in the policy. On July 14, 1970, pursuant to Rule 16, F.R.C.P., a pre-trial order was entered which limited Connecticut General's defense to fraud. Depositions

were then taken of the medical witnesses and the case prepared for trial on the theory that Petitioner need only show that her husband had not been guilty of making fraudulent statements to Dr. Rattan. At the trial, when it appeared that Connecticut General might raise a defense based on an implied good health clause or the clause contained in the conditional receipt, Petitioner, with leave of Court, filed a supplemental answer alleging waiver of those defenses. (R. 48-50)

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SUPREME COURT, U. S.
FILED
JUN 10 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1497

LORETTA FAY BECK, *Petitioner*

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Respondent's Reply to Petition for Writ of Certiorari

To The United States Court of Appeals
For The Fifth Circuit

THOS. H. LAW
LAW, SNAKARD, BROWN & GAMBILL
1500 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102
Attorneys for Respondent

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone 332-4070

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1497

LORETTA FAY BECK, *Petitioner*

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Respondent's Reply to Petition for Writ of Certiorari

To The United States Court of Appeals
For The Fifth Circuit

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, Connecticut General Life Insurance Company, prays that the Petition for Writ of Certiorari sought by Loretta Fay Beck, Petitioner, be denied. The record before this Honorable Court does not bring this case within the purview of Rule 19, Supreme Court Rules. There is no "special and important reason" for a review of writ of certiorari of the decision of the Court of Appeals. Petitioner does not even contend that the Court has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, has decided an important question of federal law not heretofore decided or has

decided a federal question in a manner which conflicts with applicable decisions of this Court. Nor has the Fifth Circuit here "decided an important state question in a way conflicting with applicable state law," the only remaining reason, under Rule 19, for a review by this Court on writ of certiorari. Petitioner characterizes the Court's opinion as "patently absurd" (Br. 5) and its statements therein as "bizarre" (Br. 5) and "utter nonsense" (Br. 8), but the fact is that the Fifth Circuit merely followed the Texas law established by a generation of cases.

THE FACTS

The Hypothesis On Which Petitioner's Argument is Based is Supported By Neither a Jury Finding Nor The Evidence

It is uncontroverted that the insured, Jerry D. Beck, was not in good health at the time his life insurance policy was delivered. The jury so found (R. 526, 527) and Petitioner so admits. (Br. 3) Petitioner's insistence that the fact of bad health was waived is wholly dependent on the validity of her assumption, stated at page 3 of her brief, that:

> "Connecticut General had *knowledge* of Beck's illness prior to the time the policy was delivered and prior to the time it collected the full premiums." (Emphasis by Petitioner)

This statement — the hypothesis on which Petitioner's argument rests and without which her case must fall — is in error. There is no such jury finding, nor could there have been under the facts.

The jury issue upon which Petitioner apparently relies to show knowledge is Question No. 8. This question does not inquire as to whether Connecticut General had knowledge of the state of Beck's health at the time of the delivery of the policy. Rather, it asks whether before Beck's *death*, Connecticut General had knowledge of such facts as would *by a reasonably diligent investigation have disclosed* that Beck was not in good health in time for the company to have requested the return of the policy during Beck's lifetime. This is certainly not a finding of knowledge, much less knowledge prior to delivery.

Connecticut General in Fact Did Not Have The Knowledge Petitioner Asserts

A. Mr. Beck's fraud in failing to reveal his long history of bad health

Respondent not only did not know that Mr. Beck was not in good health prior to the time the policy was delivered. As a result of the fraud practiced by Mr. Beck, it had no reason even to be suspicious.

Although Mr. Beck had experienced intermittent pain and numbness in his limbs and discoloration of his arm and hand for some two years prior to the time he applied for insurance with Respondent, he did not reveal these facts. He failed to disclose his admission to St. Joseph Hospital, as well as an arteriogram taken at St. Joseph. He did not tell the insurance company examining physician that an amputation of his right leg had been advised by his doctor but that he

had refused the amputation. He hid the fact that he had been treated by a Dr. Morris Hill and later by a Dr. Gaston Machado and the further fact that both of these doctors had prescribed vasodilators. He did disclose the name of Dr. R. W. Hall, his family physician, but failed to note that Dr. Hall had ever treated him for vascular problems. (R.23, 104-114)[1]

Yet Mr. Beck was well aware of all these pertinent facts. Though he hid them from the insurance company when he was trying to get his policy approved, he readily gave his history to his treating physician, Dr. Donald Lee Eakin, when he was admitted to Hurst General Hospital just 13 days later, before the delivery of the policy. Nor did he reveal them when the policy was delivered. (R. 452-454) Approximately one month and nine days after such delivery, he suffered a coronary occlusion which resulted in his immediate death. (Def. Ex. 1, 2)

B. Mr. Beck's "minor gastritis flareup"

Petitioner would have this Court believe that correspondence in the home office file showed Connecticut General's actual knowledge of Beck's illness. The correspondence in question was admitted in evidence as Plaintiff's Exhibits 14 and 17, in the trial record

[1]Four doctors testified at the trial that knowledge of Mr. Beck's treatment at St. Joseph Hospital in 1966 would have caused them to increase the premium to be charged for writing a life insurance policy on his life. (R. 250-251, 253-255, 279, 283-285, 94, 332-333) They all went on to testify that knowledge of the subsequent problems such as numbness and discoloration of both the right foot and left arm and the continued treatment with vasodilators, would have caused them to completely reject the risk regardless of the premium. (R. 251-252, 255, 280, 285-286, 331-335)

before the Fifth Circuit. This correspondence shows that Connecticut General was informed only that Beck had entered the hospital for a "minor gastritis flare-up" which was considered insignificant since his gastric problem had already been taken into account on the original premium rating. Plaintiff's Exhibit 17 specifically states that, "on September 19 or 20, Mr. Beck entered the hospital with what the agent understood to be an attack of gastritis." There is indeed scant basis for the assertion that Joseph Snelus, the soliciting agent, was privy to the "knowledge" which Petitioner attributes to him. Certainly, if he did have any such knowledge, Mr. Snelus was not passing it on to his superiors.

As shown by the record:

1. Mr. Beck called Snelus sometime around the end of September, 1968, for the purpose of initiating a possible claim under a disability income policy. Beck informed Snelus that he had been in the hospital and that "he thought he had eaten some pizza and it had made him sick or something, and they had taken him to the hospital and run some tests, and that the doctor had given him some medication." (R. 432)

2. Snelus testified at this point that the medication "was in some way connected with dilating his blood or vessels or something." (R. 432) On cross-examination, Snelus admitted that he did *not* recall whether it was *before* or *after* delivery of the policy that he learned that Beck was going to have some tests run. (R 450)

3. Beck told Snelus that he had been given "a clean bill of health" and Snelus admitted that "he had no reason to believe otherwise." (R. 452)

4. On or about October 7, 1968 the policy insuring his life was delivered to Beck. On October 29, he was again admitted to the hospital for a complete series of tests in the cardiovascular unit. These tests showed once more the occlusion of the left axillary artery, as well as a fifty percent obstruction of the main artery going to the right arm. (R. 310) Mr. Beck was released from the hospital on November 6. On November 16, he died of "coronary occlusion due to arteriosclerosis." (Def. Ex. 1)

The Fifth Circuit did not in its opinion find it necessary to discuss the facts of the case, holding that as a matter of law Petitioner was not entitled to recover even under the assumptions indulged by Petitioner. The facts as they appear in the record are set forth briefly hereinabove to demonstrate the true state of Mr. Beck's health and the falsity of Petitioner's premise of "knowledge." Obviously, if there were no knowledge on the part of Respondent (as there was not), there is no factual basis for waiver.

But even had there been knowledge, the Texas cases have consistently held that good health is a condition precedent to a life insurance policy's becoming effective and that, absent good health, there is no *legal* basis for waiver regardless of *factual* considerations. Since the insured was not in good health at the time he applied for the policy or at the time the policy

was delivered, it never became effective and so there was nothing to waive, no act on the part of the insurance company to estop it. This was the basis of the holding by the Fifth Circuit.

THE LAW

Good Health Being a Condition Precedent To a Life Insurance Policy's Becoming Effective, Waiver And Estoppel Cannot Enlarge The Risks Covered And Thus Create a New Contract

The law on waiver and estoppel as applied to *life* insurance is succinctly stated in two cases bearing the stamp of approval by the Supreme Court of Texas. "The stipulation in the policy sued on to the effect that no obligation is assumed by the company unless the insured be in sound health at the date of the policy, should be construed as a condition precedent to the policy's becoming effective." *American National Insurance Company v. Lawson*, 127 SW2d 294, 295 (Tex.Comm.App., 1939, opinion by Judge Hickman—later Chief Justice—adopted as the opinion of the Supreme Court). Indeed, it even is immaterial whether the proposed insured knew of his condition or not. In *Lawson* the Court adopted as its statement of the Texas law, the following language from *American Nat. Life Insurance Company v. Corley Co.*, 73 SW2d 598:

> "It is now well settled in this state that a stipulation in a life insurance policy that such policy shall not take effect unless the insured is in sound health at the date the policy is de-

> livered is, unless restrained by some statute, valid and enforceable, and it is immaterial whether the insured know of his condition in that respect or not. His good faith in believing that he was in sound health at the time the policy was delivered will not authorize a recovery if in fact at the time of the delivery of the policy he was suffering from an ailment of a substantial nature which continued and ultimately caused his death. 24 Tex.Jur. 691; Wright v. Federal Life Insurance Co. (Tex.Com.App.) 248 S.W. 325; Southern Surety Co. v. Benton (Tex.Com.App.) 280 S.W. 551; American National Ins. Co. v. Melton (Tex.Civ.App.) 29 S.W.2d 795; American Nat. Ins. Co. v. Jarrell (Tex.Civ.App.) 50 S.W.2d 875; Ofield v. National Ben. Life Ins. Co. (Tex. Civ.App.) 293 S.W. 271; Denton v. Kansas City Life Ins. Co. (Tex.Civ.App.) 231 S.W. 436." At page 295.

Subsequently the Texas Supreme Court again expressly placed its stamp of approval on a similar statement of the law by noting "writ refused" on *Great American Insurance Company v. Mitchell*, 335 SW2d 707 (Tex.Civ.App.-San Antonio 1960, writ ref.). There the policy provided that coverage should cease at age 65. The insurance company continued to accept the premiums tendered after the insured reached age 65 and the trial court held that by accepting the premiums, the company had waived the age requirement and was estopped to claim that condition as a defense. In reversing and rendering the case, the opinion by Judge Jack Pope (now one of the most respected justices on the Texas Supreme Court) pointed out that the Texas law on this point

is settled. Waiver and estoppel do not apply to a condition of coverage.

> "Plaintiff's claim and recovery run directly contrary to the settled Texas law of waiver and estoppel with respect to risks designated in an insurance policy. Waiver and estoppel may operate to avoid a forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. In other words, waiver and estoppel can not create a new and different contract with respect to risks covered by the policy. This has been the settled law of Texas since the decision in Washington Nat. Ins. Co. v. Craddock, 130 Tex. 251, 109 S.W.2d 165, 113 A.L.R. 854. See also, Vaught v. Texas Employers' Ins. Ass'n, Tex.Civ.App., 257 S.W.2d 445; Powell v. American Casualty & Life Co., Tex.Civ.App., 250 S.W.2d 744; Massachusetts Bonding & Insurance Co. v. Dallas Steam Laundry and Dye Works, Tex.Civ.App., 85 S.W.2d 937; C. E. Carnes & Co. v. Employers' Liability Assur. Corporation, 5 Cir., 101 F.2d 739; 29A Am. Jur., Insurance, §1135; 163 A.L.R. 691; 113 A.L.R. 857." At page 708.

The holding in the *Mitchell* case has been recognized by the Fifth Circuit as "a principle of Texas law . . . binding . . . upon us" in *Travelers Indemnity Company v. Holman*, 330 F.2d 142, 144 (5th Cir., 1964). See also *Powell v. American Casualty & Life Company*, 250 SW2d 744, (Tex.Civ.App.-Dallas 1952, error ref., n.r.e.) and *White v. Great American Reserve Insurance Company*, 342 SW2d 793 (Tex.Civ.App.-Dallas, 1961, no writ hist).

An annotation of the question here presented appears at 1 A.L.R.3d 1139. The rule is summarized at Section 11, page 1159 as follows:

> "The sound health requirement of a life, accident, or disability policy is ordinarily held not subject to the doctrines of waiver or estoppel."

Petitioner has chosen to ignore these clear expressions by the Texas Supreme Court which set forth the law as to *life* insurance cases. Instead, she cites numerous cases involving *property* insurance. Thus, she tells this Court that "the doctrines of waiver and estoppel have been *consistently* applied against insurance companies in Texas for a century" (Br. 4, emphasis by Petitioner), citing *Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118, (Tex. 1885). In further support of her contention she cites such cases as *Southern Underwriters v. Jones*, 13 SW2d 435 (Tex.Civ.App.-1929, writ ref'd) and tells the Court that it "is one of *fifty* (sic) authorities cited in 1962 in *Mims v. Houston Fire & Casualty Co.*, 362 S.W.2d 880 (Tex.Civ.App. 1962, no hist) for the proposition that the doctrines [of waiver and estoppel] will be applied. . . ." Petitioner neglects to inform the Court that these, too, are fire and property insurance cases, not involving life insurance. They have no application to the life insurance case before the Court.

There is a clear distinction between property insurance and life insurance, both as to underwriting techniques and the law governing underwriting. The basic distinction is stated at 32 Tex.Jur. 2nd *Insurance*, Sec. 160, Page 722, as follows:

> "With reference to contracts for life insurance, agents do not have power to conclude oral agreements for temporary or other character of insurance, but they merely take applications and collect premiums and forward same to their companies for approval and acceptance. In the case of insurance on property, however, a general agent, authorized to receive applications, accept or reject risks, receive premiums, and issue and deliver policies, has authority to enter into a valid contract of insurance."

The basis for the decision in the instant case is that waiver and estoppel cannot create a contract. If Connecticut General's agents were authorized to create contracts, as is the case with most property insurance agents, this matter would never be in its present posture.

Petitioner asserts that the Fifth Circuit "admits that its decision is in conflict with five Texas decisions — three cited in the margin of its original Opinion and two cited in the Opinion on Rehearing" and berates as "utter nonsense" the statement by the Court that "To the extent that the cases cited in the margin would support appellee's position they have been overruled by the above cited cases." Petitioner apparently has overlooked the fact that the statement by the Fifth Circuit is prefaced with the phrase "*To the extent* that the cases cited in the margin would support appellee's position. . ." (emphasis supplied) and therefore that Court does not, as Petitioner asserts, "admit that its decision is in conflict with the cases cited." In fact, it is not. Although Petitioner points out that *National Aid Life Ass'n. v. Murphy*,

78 S.W.2d 223 (Tex.Civ. App. 1934, writ dism'd) has been cited by the Texas Supreme Court in *Texas Prudential Ins. Co. v. Dillard*, 307 S.W.2d 242, 252 (Tex. 1957), the citation was on an altogether different point. The same is true of *Terry v. Texas Prudential Ins. Co.*, 77 S.W.2d 761 (Tex.Civ. App. 1934, writ dism'd), which Petitioner finds cited by the Supreme Court of Texas in *Hassell v. Commonwealth Casualty & Ins. Co.*, 184 S.W.2d 917, 919 (Tex. 1945). The third case mentioned by Petitioner *(Southern Underwriters v. Jones, supra)* is the fire insurance case referred to hereinabove.

In short, the cases cited by Petitioner fall into the categories of fire and property insurance (e. g., *Republic Ins. Co. v. Silverton Elevators, Inc.*, 477 S.W. 2d 336, (Tex.Civ.App., Feb. 14, 1972, Rehearing denied March 13, 1972, Application for writ of error pending); *Ende, supra; Jones, supra; Mims, supra);* or merely cite earlier cases on points of law not pertinent (e. g., *Dillard, supra;* and *Terry, supra);* or are cases where the insured had accurately stated the facts showing bad health but the insurance company representative had deliberately changed the application to hide this fact (e. g., *Lee v. Mutual Protective Ass'n. of Texas*, 47 S.W.2d 402 (Tex.Civ.App.-1932, writ dism'd); *Terry, supra);* or the insured's physical complaint did not in fact constitute "bad health" in the sense used in the policy (e.g., *Legal Security Life Ins. Co. v. Erwin*, 372 S.W.2d 750 (Tex. Civ.App.-1963, writ ref'd. n.r.e).

There Was No "Waiver By Election Of Defenses" In The Case At Bar.

Petitioner devotes a single page of her brief to her "Rule Two: Waiver By Election of Defense." Though she asserts the existence of this rule, nowhere does she assert that it applies to the case at bar. Nor does it have any such application.

As shown by the record, on June 24, 1969, Respondent's Assistant Claims Manager, Mr. Selig, wrote Petitioner's attorney denying Mrs. Beck's claim on grounds the policy was issued at a time when the company was not aware of the "extent and seriousness of Mr. Beck's medical history." (Def. Ex. 18, Tr. 332). The last paragraph of this letter goes on to state:

> "Nothing in this letter should be construed as a waiver of any of Connecticut General's rights or defenses under the above mentioned policies, and all of these rights and defenses are reserved to the company, whether or not specifically mentioned herein."

Mr. Atkins then wrote Mr. Selig (Pl. Ex. 30, Tr. 417) inquiring what the company meant by "the extent and seriousness of Mr. Beck's medical history," and asking what Mr. Selig intended by saying that nothing in his letter should be considered "as a waiver of any of Connecticut General's rights or defenses." Mr. Selig's reply is dated August 19, 1969. (Pl. Ex. 31, Tr. 418) The next to last paragraph of that letter states:

> "We are very sorry that a more favorable decision could not be made on this claim. Of course,

> you understand that nothing in this letter should be construed as a waiver of the company's rights or defenses under the above captioned policies, and all of these rights and defenses are reserved to the company, whether or not mentioned herein. The last sentence is our standard reserve clause in answer to your question regarding a similarly worded statement in my previous letter."

In *Great American Accident Insurance Company v. Roggen*, 144 SW2d 1115 (Tex.Civ.App.-Galveston 1940, no writ), the Court held that statements such as those contained in both of Mr. Selig's letters are sufficient to avoid any questions of waiver or estoppel as to a company's defenses. The Court quoted the rule of waiver as stated in *National Aid Life Ass'n. v. Murphy*, 78 SW2d 223, 227 (Tex.Civ.App.-Dallas 1934, writ dism'd) and then went on to state:

> "We are constrained to hold that the rule just referred to does not apply to the facts found by the court, because, as appears from the letter, the insurance company in effect stated that it was waiving no grounds which it had for not paying the claim. The intention to waive grounds of defense, which are not expressly stated, cannot be implied against the express statement that such grounds are not waived."

In order to invoke the rule stated in the *Murphy* case the insured must show that the company set out its specific ground for denial at a time when it had knowledge of all facts necessory for assertion of any remaining defenses. This contention was not raised by Petitioner at trial, and no jury issues concerning

these matters were requested by Petitioner. Not only does Petitioner have the burden to obtain a finding in the trial court, but she has the additional burden of showing that she acted on the company's denial as announced and that she incurred expenses, or loss, or detriment in consequence thereof. There has been no showing of such reliance and detriment. It is difficult to imagine that Petitioner would have dropped her claim, and thus have saved the expense and trouble of a suit, had Connecticut General simply added that, in addition to misrepresentation, the claim was being denied because Mr. Beck was not in good health at the time the policy was delivered.

The question of reliance was raised in *Scott v. Industrial Life Insurance Company*, 411 SW2d 769 (Tex.Civ.App.-Dallas 1967, no writ). The Court states at page 772:

> "It is true, as now contended by appellant in his brief, that our courts have recognized the rule of law to the effect that where one specific ground of forfeiture is urged against a policy of insurance, and the validity thereof denied on that ground alone, all other grounds are considered waived. However, this rule is modified to the effect that it is inapplicable where the insured has not acted upon the company's position of denial as announced and has not incurred expense or loss or detriment in consequence thereof." (Citing National Aid Life Ass'n v. Murphy, Tex.Civ.App., 78 S.W.2d 223, 227; American Employers' Ins. Co. v. Brock, Tex.Civ.App., 215 S.W.2d 370, 375; Galveston County v. Hartford Fire Ins. Co., Tex.Civ.App., 231 S.W.2d 684)

And regardless of the foregoing, Petitioner's argument fails in light of Rule 15, Federal Rules of Civil Procedure, which provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

The good health defense was, in fact, raised by the pleadings, being asserted in Defendant's First Amended Original Answer which was filed with an order granting leave to file. No objection thereto was even raised by Petitioner. Thereafter, at time of trial the issue concerning good health was submitted to the jury without objection, and Petitioner's attorney was allowed to submit issues concerning estoppel and waiver.

CONCLUSION AND PRAYER

Because the judgment of the Court of Appeals is eminently correct and the Petition for Writ of Certiorari does not present matters of sufficient consequence to warrant this Court's review of this case on certiorari, Respondent, Connecticut General Life Insurance Company, respectfully prays that the Petition for Writ of Certiorari be denied.

THOS. H. LAW
Attorney for Respondent

Thos H. Law

Of Counsel:
LAW, SNAKARD, BROWN & GAMBILL
1500 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102

CERTIFICATE OF MAILING

I, Thos. H. Law, attorney of record for Respondent, do hereby certify that the foregoing Reply has been served upon Petitioner, Loretta Fay Beck, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to her attorney of record, Mr. Bill Atkins, P. O. Box 248, 407 Arlington Bank & Trust Building, Arlington, Texas 76010, on this 7 day of June, 1972.

Thos. H. Law

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1497

LORETTA FAY BECK, *Petitioner*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Petitioner's Reply Brief

BILL ATKINS
407 Arlington Bank & Trust Building
P. O. Box 248
Arlington, Texas 76010
Attorney for Petitioner

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone 332-4070

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1497

LORETTA FAY BECK, *Petitioner*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Petitioner's Reply Brief

Petitioner Loretta Fay Beck replies to the argument of Connecticut General against a review of the opinion of the Fifth Circuit and says:

1. There are special and important reasons why this Court should review the opinion of the Fifth Circuit.

2. The "Facts" argued by Connecticut General are not true and are designed to hide the Fifth Circuit's misstatement of the Texas law.

3. Connecticut General's argument against "Waiver by election of defenses" (pages 14 and 15) is based on its version of the facts — not on the correctness of the Fifth Circuit's opinion concerning Texas law.

4. The Texas Supreme Court has recently granted applications for writ of error in *Minnesota Mutual Life Insurance Co. v. Morse*, 476 S.W. 2d 753 and *Re-*

public Insurance Co. v. Silverton Elevators, Inc., 477 S.W. 2d 336, (cited in the Petition for Writ of Certiorari). Arguments were heard in these cases on July 19, 1972. It is likely that the Texas Supreme Court will explain further those instances where the doctrines of waiver and estoppel have application when its term begins in October, 1972.

ARGUMENT

1. Special and Important Reason to Review the Opinion Below.

The opinion of the Court of Appeals for the Fifth Circuit has been reported at 456 F. 2d 1040. The importance of the Fifth Circuit's misstatement of Texas law is brought into focus by the first headnote. It is keyed to *West's Texas Digest Insurance 372(3)* and, in substance, states that, under Texas law, a good health clause "*could not be waived and the insurer could not be estopped*" from asserting it regardless of the facts.

Connecticut General makes the same argument on page 6 of its brief:

> "The Fifth Circuit did not in its opinion find it necessary to discuss the facts of the case, holding that as a matter of law petitioner was not entitled to recover even under the assumptions indulged by Petitioner ***
>
> " *** there is no *legal* basis for waiver regardless of *factual* considerations."

The Fifth Circuit has abandoned the historic and

universal doctrines of waiver and estoppel — the opinion represents a radical departure from the established law of Texas.[1] Without the slightest doubt or hesitation, the Fifth Circuit stated that the doctrines

---

[1]The two rules rejected by the Fifth Circuit and relied upon by Petitioner are stated as follows:

Rule One:

"***Where a policy is issued with knowledge by the insurer, actual or presumed, of facts which would otherwise vitiate the policy under a provision embodied therein, or of the falsity of a material representation contained in the application, the provision or misrepresentation is deemed waived by the insurer by the unconditional issuance or delivery of the policy. That is to say, where the insurer, at the time of the issuance of a policy of insurance, has knowledge of existing facts which, if insisted on, would invalidate the contract from its very inception, such knowledge constitutes a waiver of conditions in the contract inconsistent with the known facts, and the insurer is estopped thereafter from asserting the breach of such conditions. The law is charitable enough to assume, in the absence of any showing to the contrary, that an insurance company intends to execute a valid contract in return for the premium received; and when the policy contains a condition which renders it voidable at its inception, and this result is known to the insurer, it will be presumed to have intended to waive the condition and to execute a binding contract, rather than to have deceived the insured into thinking he was insured when in fact he was not, and to have taken his money without consideration.

"An insurer is also precluded from relying on a breach of policy clause when at the time of the issuance of the policy both the insurer and the insured are aware of an uncertainty as to insured's compliance with the clause." 43 Am. Jr. 2d 1038, Ins. §1117, and Texas authorities cited therein. Also see 45 C.J.S. 671, Ins. §704 and Texas authorities cited therein.

Rule Two:

"Where the company denies liability or refuses to pay a loss on a specified ground, it is estopped to assert other grounds relieving it from liability of which it had full knowledge where insured has acted on its position as announced and suffered resultant detriment, or as the rule is sometimes more broadly stated, when one specific ground of forfeiture is urged against a policy of insurance and the validity thereof denied on that ground alone, all other grounds are waived."

of waiver and estoppel have no application in Texas:

> "This is not the law in Texas as the following cases make clear. (Citing three cases.) To the extent that the cases cited in the margin would support Appellee's position, they have been overruled."[2]

On rehearing the Fifth Circuit was not as sure of the Texas law. It noted later opinions of the Texas Supreme Court and Texas Courts of Civil Appeal " *** *which held that waiver and estoppel could be applied against an insurance company that delivered a policy to an insured with knowledge that he was in bad health.*"

The Fifth Circuit resolved its confusion — not by analyzing the cases — but by a mere "guess" or "prediction" of what the Texas Supreme Court would hold today:

> " *** we continue to believe our initial *Erie* guess to be the correct prediction *** "

A principle so vital to Petitioner and the millions of Texas residents whose security depends upon the proceeds of life insurance deserves something better than a mere "*guess*" or an unfounded "*prediction*". Had the Fifth Circuit made a careful analysis of the Texas cases it cites, it would have found the law well

---

[2]The three cases cited in the margin as being overruled have never been questioned by the Texas Courts and are still cited as controlling. The absurdity of the Fifth Circuit's opinion becomes obvious when it cites *Scott v. Industrial Life Ins. Co.*, 411 S.W. 2d 769 as an authority overruling *National Aid Life Ass'n. v. Murphy*, 78 S.W. 2d 223. By no stretch of the imagination are these cases in conflict. The language showing there is no conflict is quoted on page 15 of Connecticut General's Brief.

established, that there is no conflict between the decisions and no basis for its "*Erie guess*" or "*prediction*".

The Fifth Circuit Failed to Note a Simple Distinction in the Texas Cases.

All Texas cases cited can be easily distinguished on the basis of whether or not the insurer was charged with *knowledge* of the breach of the policy provision at the time the policy was delivered. If the insurer did not have knowledge of the applicant's illness, the good health provision will be given effect. If the insurer, *with knowledge* of the applicant's illness, chooses to deliver the policy and collect the premium, it then waives the good health provision. The Fifth Circuit failed to note this simple distinction and has vitiated the doctrines of waiver and estoppel. There is an immense difference between saying "the rules do not exist" versus "the rules have no application to these facts".

2. Connecticut General's "Facts"

A large portion of Connecticut General's Reply Brief is devoted to "The Facts". In general, it charges that Beck was guilty of fraud. The misstatements of fact are so gross as to hide the Fifth Circuit's misstatement of the law.

"The Facts" as outlined on pages 2 to 7 of Connecticut General's Brief, bear little resemblance to the truth. If Connecticut General's "Facts" were true and it did not have knowledge of Beck's illness, the rules on waiver and estoppel would have no application. The

Fifth Circuit could have so stated without doing violence to the principle of law. In truth, it is Connecticut General, not Beck, who is attempting a fraud. The jury found that Beck was not guilty of fraud. (R. 522, Questions 2-5) The Trial Court, by applying Texas law, determined that Connecticut General was attempting a fraud.

Facts Establishing Connecticut General's Attempted Fraud

While Connecticut General denies knowledge of Beck's illness, the undisputed evidence shows otherwise:

1. Around September 25, 1968 — about a week before the policies were delivered — Beck telephoned Connecticut General's agent and told him that he (Beck) was in or had just gotten out of the hospital, that he was having a problem with poor circulation; that he was taking drugs to dilate his blood vessels and improve circulation. (R. 432-433, 456) Connecticut General was also informed that Beck was scheduled to go to Baylor University Medical Center in Dallas later in October for additional studies and tests to determine the cause of his illness. (R. 435)

2. With this knowledge, Connecticut General delivered the policies to Beck some time in October, 1968. (R. 434) It collected $718.25 in premiums on October 7, 1968. (Plaintiff's Exhibits 3, 4 and 5, Tr. 14-16)

3. The jury found that, at the time the policies were delivered, Connecticut General's agent *had knowledge of facts reasonably sufficent to put him on notice that*

Jerry D. Beck was not in good health". (R. 529, Question 12)

Connecticut General is charged with the knowledge of its agent. 45 C.J.S. 648, Insurance §692, in part reads:

> "*Stipulations in policy.* Notice to an agent of a ground for forfeiture may be notice to the company, although the agent is without authority to waive the forfeiture, or although the policy provides that the agent has no authority to waive its conditions *** "

Also see 45 C.J.S. 656-657, Insurance §696 and authorities cited in footnote 5, page 10, Petition for Certiorari.

4. Before Beck's death, Connecticut General refused to rescind the policies and refund the premiums when its Fort Worth Manager asked the home office about the possibility of a claim being made. Connecticut General confirmed its notice of Beck's illness in a letter written by a Vice President in the home office (Tr. 349, Plaintiff's Exhibit No. 16)

> " *** You indicated to me that Mr. Beck had become ill around September 20 and although he had not worked since that date *** . The point of your call was that Beck was gong back to the hospital and there, obviously, would be a question regarding any potential claim during the period of time immediately subsequent to issue."

How can Connecticut General avoid being charged with knowledge of facts reasonably sufficient to put it on notice that Beck was not in good health? The jury

found that Connecticut General had knowledge of Beck's bad health in time for the company to have requested the return of the policies prior to Beck's death. (R. 527, Question 8)

Restating the Texas rule:

> "To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as grounds of avoidance, is to *attempt a fraud*".

See, *Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118, 123 (Tex. 1885), *Lee v. Mutual Protective Ass'n of Tex.*, 47 S.W. 2d 402, 404 (Tex. Civ. App. 1932, writ dism'd), *Superior Ins. Co. v. Kling*, 321 S.W. 2d 151, 155-156 (Tex. Civ. App. 1959, Aff'd, 327 S.W. 2d 422).

Connecticut General's attempted fraud has been completed by the Fifth Circuit — under its judgment, Connecticut General is entitled to keep Beck's premiums without liability. The opinion of the Fifth Circuit is an invitation for a fraudulent insurer to use the federal courts to hide its fraud.

3. Connecticut General Recognizes the Rule on Waiver by Election of Defenses.

In spite of the Fifth Circuit's opinion, Connecticut General recognizes that Texas Courts have uniformly applied the rule on waiver as stated in *National Aid Life Ass'n v. Murphy*, 78 S.W. 2d 223, 237 (Tex. Civ. App. 1934 — writ dism'd.). The argument of Connecticut General on pages 14 and 15 of its Brief is not against the rule, but against the application of the

rule. It argues that its version of "the facts" do not invoke the rule.

Connecticut General quotes from *Scott v. Industrial Life Ins. Co.*, 411 S.W. 2d 769, 772, on page 15 of its brief — this is the case the Fifth Circuit cited as an authority overruling the *Murphy* case. The language quoted by Connecticut General from the *Scott* case shows clearly that there is no conflict between the *Scott* and *Murphy* opinions. In fact, the *Murphy* case is cited in the *Scott* opinion with approval. It is a mystery as to why the Fifth Circuit held the *Scott* case to be an authority overruling the *Murphy* case.

Connecticut General Waived the Defense Based on the Policy Provision by Electing to Defend on Fraud

The pleadings and pre-trial order established the theory of Connecticut General's defense. All medical testimony was developed on the theory that Petitioner would be defending against the charge that Beck had fraudulently represented himself to be in good health. The mere pleading of fraud based upon representations of good health will not raise a different defense based on a policy provision — a condition precedent requiring good health. The submission of a question on good health to the jury in connection with the fraud defense should not amount to a waiver by Petitioner of an unplead defense based on a policy provision not brought to the attention of the trial court or the opposing party.

CONCLUSION

The Fifth Circuit has permitted Connecticut General to argue successfully that it *knowingly* sold $718.25 of worthless policies. Connecticut General may now retain the premiums without liability. There is no authority in Texas law which can lend support to the absurd results reached by the Fifth Circuit. A Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BILL ATKINS
407 Arlington Bank & Trust Building
P. O. Box 248
Arlington, Texas 76010
Attorney for Petitioner

CERTIFICATE OF MAILING

I, Bill Atkins, attorney of record for Petitioner, do hereby certify that the foregoing Reply Brief of Petitioner has been served upon Respondent, Connecticut General Life Insurance Company, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to its attorney of record, Thos. H. Law, Law, Snakard, Brown & Gambill, 1500 Fort Worth National Bank Building, Fort Worth, Texas 76102.

Bill Atkins

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1497

LORETTA FAY BECK, *Petitioner*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Petition for Rehearing

Petitioner respectfully moves this Court to vacate its order denying the petition for writ of certiorari entered October 10, 1972 and to grant the petition. As grounds for this motion petitioner would show the Court as follows:

1. The Court of Appeals for the Fifth Circuit made an "*Erie guess*" and substituted its unsure prediction of the Texas law for that of the Trial Judge who sits and has practiced for many years in the Texas Courts.[1]

[1]See: *The Law of Federal Courts* by Chas. Alan Wright, 2d Ed. 1970, p. 240, 2nd column:

"As a general proposition, a federal court judge who sits in a particular state and has practiced before its courts may be better able to resolve complex questions as to the law of that state than is some other federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts have frequently voiced reluctance to substitute their own view of the state law for that of the federal judge. As a matter of judicial administration, this seems defensible. But there is some tendency to go beyond that, and to say that if the trial court has reached a permissible conclusion under state law, the appellate court cannot reverse even if it thinks the state law otherwise, thus treat-

It held that waiver and estoppel would not be applied today against an insurance company by the Texas Supreme Court. The Fifth Circuit cited but refused to follow five Texas decisions.[2] It made no attempt to distinguish between the cases cited in its opinion, but concluded:

> "Although the former two cases clearly raise a doubt as to what the Supreme Court of Texas would hold the applicable rule of law to be today, we continue to believe our initial *Erie* guess to be the correct prediction and therefore adhere to our original decision."

2. Since the date of the Fifth Circuit's decision two decisions have been reported which are in direct conflict with the decision herein. The Fifth Circuit did not have the benefit of these later opinions when it made its "*Erie* guess" that waiver and estoppel have no application in Texas. The language in point from each of the new cases is quoted:

---

ing the question of state law much as if it were a question of fact. It would seem that a party is entitled to review the trial court's determination of state law just as he is of any other legal question in the case, and that the decision of the local trial judge cannot reasonably be regarded as conclusive."

[2]The five cases which the Fifth Circuit rejected are: *Texas Prudential Insurance Co. v. Dillard*, Tex.Sup.Ct. 1957, 307 S.W. 2d 242; *Legal Security Life Ins. Co. v. Erwin*, Tex.Civ.App. – Texarkana – 1963, writ refused, n.r.e., 372 S.W. 2d 750; *National Aid Life Ass'n v. Murphy*, Tex.Civ.App. 1934, 78 S.W. 2d 223, writ dismissed; *Terry v. Texas Prudential Insurance Co.*, Tex.Civ.App. 1934, 77 S.W. 2d, writ dismissed; *Southern Underwriters v. Jones*, Tex.Civ.App. 1929, 13 S.W. 2d 435, writ refused.

Case One: Minnesota Mutual Life Ins. Co. v. Morse (Tex.Civ.App. — Texarkana — 1972) 476 S.W. 2d 753, 758, rehrg. den. Feb. 22, 1972.

"Points 5 through 10 as raised by Appellant had to do with waiver and estoppel. *** We think the provisions of the group insurance policies bring them clearly within the provision of waiver and estoppel. *Legal Security Life Ins. Co. v. Erwin*,[3] Tex.Civ.App. 1963, 372 S.W. 2d 750, Writ ref'd., n.r.e., and the authorities cited therein."

Case Two: Republic Ins Co. v. Silverton Elevators, Inc. (Tex.Civ.App. — Amarillo — 1972) 477 S.W. 2d 336, Rehrg. denied March 13, 1972 (p. 337).

"Under such circumstances, our Supreme Court early held in *The Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118 (1885), that the insurance company waived *** and is estopped from denying liability *** (p. 338). The rationale for the rule is that an insurance company may not deliver a policy with full knowledge of facts upon which liability thereunder may be disputed, and then insist upon these facts in avoidance of the liability undertaken. Such course of action is an assertion that the policy is valid at time of delivery and is a waiver of the known ground of invalidity by which the insurer is estopped from defeating an action brought on the policy by that defense."

3. On June 14, 1972, after filing of the petition for

[3]The Fifth Circuit cited the *Erwin* case in the opinion on rehearing, but refused to follow it.

certiorari herein, the Texas Supreme Court granted writs of error to review the decisions of the Courts of Civil Appeals in *Minnesota Mutual Life Ins. Co. v. Morse* and *Republic Ins. Co. v. Silverton Elevators, Inc.* On July 17, 1972, the Texas Supreme Court heard oral arguments in these cases and the Texas Supreme Court opinions are expected at any time. The original certificate of the Clerk of the Supreme Court of Texas is filed herewith and a copy is attached hereto as "Appendix A". Even if the Federal Courts no longer feel bound by the opinions of the Texas Courts of Civil Appeal, there is no reason to guess or speculate on the Texas law in view of the impending decisions of the Texas Supreme Court.

It has been two years since this case was tried and petitioner recovered judgment against Connecticut General. One year ago the Court of Appeals reversed the judgment, made its "*Erie* guess" which permitted Connecticut General to keep the insurance proceeds *and the premiums* — a shocking departure from all standards of justice.

4. While Petitioner realizes that the granting of a writ of certiorari is a matter of grace and not of merit, there is a dangerous precedent in the Fifth Circuit's opinion which should be excised. Although not clearly stated, the decision of the Fifth Circuit did not turn on the insurer's "knowledge" that the policy was worthless at the time it was sold — the single element which determines whether or not the transaction was fraudulent. Obviously, the Fifth Circuit failed to recognize an old fashioned fraud.

FRAUD SANCTIONED BY THE FEDERAL COURTS

A layman need not understand the theories of waiver and estoppel to recognize that it is fraud to permit an insurance company to knowingly sell a worthless policy. Try explaining to a layman that the Fifth Circuit permitted Connecticut General to keep the proceeds and the premiums, too. Without realizing that learned judges can also make mistakes, a layman will likely question the integrity of the court. Historically, the Supreme Court of Texas has refused to sanction this kind of fraud. The language chosen by the Fifth Circuit to deny petitioner's claim is broad enough to hide the fraud of Connecticut General as well as the fraud of other insurance companies. How many times will this decision be cited as an authority to sanction the fraud of an insurer?

In view of the cases now pending in the Texas Supreme Court, would not justice be best served and the integrity of the courts maintained, if the petition for certiorari were granted and this case returned to the Fifth Circuit for its further consideration?

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant a rehearing of the order of denial, vacate that order, grant the petition for certiorari and review the judgment and opinion below or, in the alternative, reverse and remand this

cause to the Court of Appeals for further consideration.

Respectfully submitted,

BILL ATKINS
407 Arlington Bank & Trust Building
P. O. Box 248
Arlington, Texas 76010
Attorney for Petitioner

CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Counsel for Petitioner

CERTIFICATE OF MAILING

I, Bill Atkins, attorney of record for petitioner, do hereby certify that the foregoing Petition for Rehearing has been served upon Respondent, Connecticut General Life Insurance Company, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to its attorney of record, Thos. H. Law, Law, Snakard, Brown & Gambill, 1500 Fort Worth National Bank Building, Fort Worth, Texas 76102.

Bill Atkins

APPENDIX A

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the application for writ of error in the case of THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY VS. ETHEL C. MORSE, EXECUTRIX, ET AL, No. B-3318, from the Sixth District, Bowie County and the application for writ of error in the case of REPUBLIC INSURANCE COMPANY VS. SILVERTON ELEVATORS, INC. ET AL, No. B-3333, from the Seventh District, Briscoe County were both granted on June 14, 1972 and were submitted and argued orally on July 19, 1972, and as of this date these two cases are still under submission and no opinions have been delivered.

IN WITNESS WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, Texas, on Oct. 30, 1972.

GARSON R. JACKSON
Clerk
/s/L. R. ADKINS
By L. R. Adkins
Deputy

[SEAL]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1497

LORETTA FAY BECK, *Petitioner*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Addendum to Petition for Rehearing

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 24(5), Petitioner would call this Court's attention to the decision of the Supreme Court of Texas in *Minnesota Mutual Life Ins. Co. v. Morse.* The new decision is in conflict with the *"Erie guess"* made by the Fifth Circuit to the effect that a good health clause cannot be waived and the insurance company cannot be estopped to assert it.[1]

On rehearing the Fifth Circuit cited but refused to

[1]The Fifth Circuit's opinion contains the following language which is in conflict with the latest Texas Supreme Court decision:

"The usual 'good health' clause in a life insurance policy provides that the policy is null and void if the insured is not in good health at the time the policy is delivered to him • • • Appellee Beck contends, however, that this condition precedent can be waived or that the company can be estopped to assert it. This is not the law of Texas • • • "

follow *Legal Security Life Insurance Co. v. Erwin*, 372 S.W. 2d 750, writ ref. n.r.e. and *Texas Prudential Insurance Co. v. Dillard*, 307 S.W. 2d 242 (Tex. 1957). It "*guessed*" that the Texas Supreme Court would *today* reject these rules on waiver and estoppel.[2]

THE TEXAS SUPREME COURT HOLDS THAT AN INSURANCE COMPANY MAY WAIVE AND CAN BE ESTOPPED FROM ASSERTING A POLICY REQUIREMENT.

The opinion of the Texas Supreme Court in *Minnesota Mutual Life Insurance Co. v. Morse* was delivered on November 15, 1972, and has not been reported. A certified copy of the opinion is enclosed with this addendum. The judgment of the Court of Civil Appeals was reversed because the facts necessary to invoke waiver and estoppel were missing; however, Justice Reavley states (p. 5):

> "Whereas *waiver* and *estoppel may operate* to avoid forfeiture of a policy *and may prevent an insurance company from avoiding payment because of the failure of the insured to comply with some requirement of the policy*, waiver and estoppel cannot enlarge the risks covered by a policy *** " (Emphasis supplied)

In this instance the Fifth Circuit's prediction was wrong—the Supreme Court of Texas did not overrule, qualify or restrict the application of the rules on waiv-

[2]The Fifth Circuit uses the following excuse for ignoring these decisions:

"Although the former two cases clearly raise a doubt as to what the Supreme Court of Texas would hold the applicable rule of law to be today, we continue to believe our initial *Erie* guess to be the correct prediction and therefore adhere to our original decision."

er and estoppel as set forth in the *Dillard* and *Erwin* cases. These cases, along with the other cases cited and relied upon by Petitioner correctly state the Texas law. The federal courts can no longer find an excuse for not following these decisions.

Historically, the Supreme Court of Texas has called it *fraud* for an insurance company to insist on a policy requirement to avoid payment when it delivered the policy with knowledge that the requirement had not been met. *Liverpool & London & Globe v. Ende*, 65 Tex. 118, 123 (Tex. 1885).

In view of the latest statement of the Texas Supreme Court, why would the federal courts deliberately choose to become a party to the fraud committed by Connecticut General?

Petitioner respectfully prays that this Court grant a rehearing, that her petition for certiorari be granted and the judgment reversed, and/or that this case be remanded to the Court of Appeals for its further consideration in light of the latest decisions of the Texas Supreme Court and the Texas Courts of Civil Appeals.

Respectfully submitted,

BILL ATKINS
407 Arlington Bank & Trust Bldg.
P. O. Box 248
Arlington, Texas 76010
Attorney for Petitioner

CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this Addendum to Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Bill Atkins

Counsel for Petitioner

CERTIFICATE OF MAILING

I, Bill Atkins, attorney of record for Petitioner, do hereby certify that the foregoing Addendum to Petition for Rehearing has been served upon Respondent, Connecticut General Life Insurance Company, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to its attorney of record, Thos. H. Law, Law, Snakard, Brown & Gambill, 1500 Fort Worth National Bank Building, Fort Worth, Texas 76102.

Bill Atkins

Bill Atkins

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1497

LORETTA FAY BECK, *Petitioner*

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

To The United States Court of Appeals
For The Fifth Circuit

Respondent's Reply to Petition for Rehearing of Writ of Certiorari

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THOS. H. LAW
Attorney for Respondent

Of Counsel:
LAW, SNAKARD, BROWN & GAMBILL
1500 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone 332-4070

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To The United States Court of Appeals
For The Fifth Circuit

Respondent's Reply to Petition for Rehearing of Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

In her Petition for Writ of Certiorari, Petitioner cited *The Minnesota Mutual Insurance Co. v. Morse*, 476 S.W.2d 753 (Tex.Civ.App., Texarkana, 1972), and *Republic Ins. Co. v. Silverton Elevators, Inc.*, 477 S.W.2d 336 (Tex.Civ. App., Amarillo, 1972), and called attention to the fact that application for writ of error was pending before the Texas Supreme Court in each case. (Petition for Certiorari, pp. 10-11.) Thereafter she filed a Reply Brief, again calling attention to these cases and pointing out that applications for writ of error had been granted. (Reply Br., pp. 1-2.)

After this Court overruled the Petition for Certi-

orari, Petitioner filed a Petition for Rehearing. It contained nothing new, merely telling this Court for the third time that *Minnesota Mutual* and *Republic Ins.* were pending before the Texas Supreme Court.

Respondent did not believe that any useful purpose would be served by filing a reply to Petitioner's briefs, which did no more than repeat her previous arguments. However, now that the Texas Supreme Court has decided *Minnesota Mutual* adversely to her contentions (exactly as both Respondent and the Fifth Circuit had in effect predicted), Petitioner has filed an "Addendum to Petition for Rehearing" and has assured this Court that black somehow is really white: that the Texas Supreme Court's reversal of the Court of Civil Appeals so as to deny recovery under the policy (because waiver and estoppel do not apply in life insurance cases), proves that waiver and estoppel *do* apply and that Petitioner should recover under the policy.

Petitioner assures this Court that "The judgment of the Court of Civil Appeals was reversed [by the Texas Supreme Court] because the facts necessary to invoke waiver and estoppel were missing." She does not say what these supposed "facts" were, nor can she. For they do not exist. This Court will, of course, observe from the opinion of the Texas Supreme Court that the beneficiary sought recovery under two group life policies. Both the insured retiree and the credit union considered the insured to be a member of the credit union until his death, and premiums were paid to and accepted by the insurer on the life of the insured until his death. In addition (and going beyond the factual

situation in our case, where the insured died approximately one month and nine days following delivery of the policy), the policy had been in effect for several years so that the incontestability clause was invoked. Nevertheless, under the well established law in Texas the Supreme Court denied recovery, stating that waiver and estoppel "cannot be used to create a new and different contract with respect to the risk covered and the insurance extended":

> "The court of civil appeals held that by acceptance of the premiums computed on the full balances of these accounts of James K. Morse up to the date of his death, Minnesota Mutual has waived any defense relative to the disability of Morse and is now estopped to deny coverage to the full extent of the balances as of the death of Morse. Whereas waiver and estoppel may operate to avoid forfeiture of a policy and may prevent an insurance company from avoiding payment because of the failure on the part of the insured to comply with some requirement of the policy, waiver and estoppel cannot enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended. Great American Ins. Co. v. Mitchell, 335 S.W.2d 707 (Tex.Civ. App. 1960, writ ref'd)." 16 Tex. S.Ct. Journal 85.

Respondent relied on and cited *Great American Ins. Co. v. Mitchell* both in the Fifth Circuit briefs (Appellant's Br. in Fifth Circuit, pp. 12-13, 16; Appellant's Reply Br., p. 12) and in its Reply to Petition for Certiorari in this Court (pp. 8-9), pointing out that the Texas Supreme Court had expressly placed its stamp of approval on the *Mitchell* holding that:

> "Waiver and estoppel may operate to avoid a forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. In other words, waiver and estoppel can not create a new and different contract with respect to risks covered by the policy." (Reply Br., p. 9.)

The Fifth Circuit also expressly recognized this statement of the Texas law by citing *Mitchell* in *Travelers Indemnity Company v. Holman*, 330 F.2d 142, 144 (5th Cir., 1964). The Texas Supreme Court now once again, in *Minnesota Mutual*, has cited and expressly approved *Mitchell*.

The point, which somehow continues to escape Petitioner, is that good health was a condition precedent to coverage in the instant case. Because (as found by the jury) this condition precedent was not fulfilled, no contract ever became effective between Mr. Beck and Connecticut General. And where a contract never came into existence between the parties, the Texas courts will not allow estoppel or waiver to create such a contract. This, once again, is the holding of the Texas Supreme Court in *Minnesota Mutual*. "Waiver and estoppel cannot enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended."

The other case cited by Petitioner in her Petition for Writ of Certiorari, her Reply, and her Petition for Rehearing is *Republic Ins. Co. v. Silverton Elevators, Inc.*, 477 S.W.2d 336 (Tex.Civ.App., Amarillo, 1972). This case has not yet been decided by the Tex-

as Supreme Court buregardless of the eventual holding, it is not pertine to the instant case. *Republic Ins.* does not involve life insurance policy but property and fire insuran, the rules for which are quite different, as set fortht pages 10 and 11 of Respondent's Reply to Petitiofor Writ of Certiorari.

Finally, Petitionersserts that "it is fraud to permit an insurance conany knowingly to sell a worthless policy . . . a layan will likely question the integrity of the Court'if the Fifth Circuit opinion in this case is not set ade. (Petition for Rehearing, p. 5.) The truth of thenatter is, as heretofore pointed out in this Responde:'s Fifth Circuit briefs and its Reply in this Court, iat

(1) There wano "fraud" whatsoever on the part of Connectiut General. The hypothesis on which Petitionr's entire argument is based (knowledge by onnecticut General of the insured's illness) ; supported by neither a jury finding nor the evdence. (Respondent's Reply, pp. 2-3, 4-6.)

(2) The policyspecifically provided that no insurance would tke effect unless the policy had been manually dlivered during the good health of the proposed inured. This provision was spelled out twice — in te body of the policy itself and then repeated inPart I of the Application, the latter specificallybeing made a part of the policy and being signedby the proposed insured. (R., p. 22.)

(3) It was unontroverted that the insured was not in good healh at the time the policy was delivered. The juryso found (R., pp. 526, 527) and

the Petitioner must and does so admit. (Petition for Certiorari, p. 3.)

(4) Mr. Beck fraudulently made application for an insurance policy claiming good health and concealing his vascular problems, discoloration and numbness of both the left arm and the right foot, long history of serious illness and hospitalizations. Approximately one month and nine days after delivery of the policy, he suffered a coronary occlusion which resulted in his immediate death.

Under the plain terms of the policy, it never took effect because the proposed insured was not in good health at the time of the delivery. "Waiver and estoppel cannot enlarge the risks covered by a policy and cannot be used to create a new and different contract with respect to the risk covered and the insurance extended." *Minnesota Mutual, supra.*

WHEREFORE, Connecticut General Life Insurance Company respectfully prays that the Petition for Rehearing of the Petition for Writ of Certiorari be denied.

THOS. H. LAW
Attorney for Respondent

Thos. H. Law

Of Counsel:
LAW, SNAKARD, BROWN & GAMBILL
1500 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102

CERTIFICATE OF MAILING

I, Thos. H. Law, attorney of record for Respondent, do hereby certify that the foregoing Reply has been served upon Petitioner, Loretta Fay Beck, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to her attorney of record, Mr. Bill Atkins, P. O. Box 248, 407 Arlington Bank & Trust Building, Arlington, Texas 76010, on this 6 day of December, 1972.

Thos. H. Law